The Solicitors' Journal

VOL. LXXXVII. **Saturday, July 31, 1943.** No. 31

Editorial, Publishing and Advertisement Offices: 29–31, Breams Buildings, London, E.C.4. Telephone: Holborn 1403.
SUBSCRIPTIONS: Orders may be sent to any newsagent in town or country, or, if preferred, direct to the above address.
Annual Subscription: £3, *post free*, payable yearly, half-yearly, or quarterly, in advance. *Single Copy:* 1s. 4d., *post free.*

Current Topics.

Hearings *in Camera*.

REFERENCE was recently made in these columns to s. 6 of the Emergency Powers (Defence) Act, 1939, which empowers courts, for the duration of the Act, to direct that throughout or during any part of the proceedings such persons or classes of persons as the court may determine shall be excluded, or to prohibit or restrict the disclosure of information with respect to the proceedings, if it is in the interests of public safety and of the defence of the realm so to order. The caution with which this power must be exercised, having regard to the constitutional importance of the publicity of judicial proceedings, was emphasised in a comment made by HUMPHREYS, J., at Sussex Assizes at Lewes on 21st July, when he dealt with an application on behalf of the Minister of Home Security for the hearing *in camera* of a libel action (*Drayson* v. *Brighton and District Wholesale Fruit, Flower and Potato Merchants' Association, Ltd. and Dancy*). On behalf of the Minister it was stated that he had given a certificate under his own hand indicating that the issue might involve an examination into the organisation of the A.R.P. service, and this might be contrary to public safety and the defence of the realm, as it might disclose information to the enemy. His lordship said that because one of the issues contained something which it was undesirable to disclose it did not follow that the whole case should be heard *in camera*. He said that he held very strong views in favour of publicity for legal proceedings, and he hesitated to say that he would deal with the case, which was an attack on an individual who said that his character was being aspersed, in such a way that no member of the public should hear anything about it. The learned judge said that he would certainly make an order that during such part of the proceedings as he would indicate in the order all persons other than those engaged in the trial should be excluded, and he would prohibit or restrict the disclosure of information about that part of the proceedings. After some evidence was given on the plaintiff's behalf, the defendants withdrew the allegations and apologised, and HUMPHREYS, J., awarded £300 damages. All who value liberty will concur in the learned judge's remarks. Secret trial is one of the outstanding features of ancient tyranny and modern dictatorship, and if we are to have it at all in this country we should have it only when the exigencies of war or of public decency make it clearly necessary, and even then only to the limited degree which the court decides to be necessary.

Costs of Appeals in Pension Cases.

THE passage of the Pensions (Appeal Tribunals) Bill through the Commons has been relatively smooth, owing to the prompt satisfaction given by the Government to critics of the original terms of the Royal Warrant. One of the more interesting points which came before the House in considering the Bill in committee arose on a discussion of cl. 6, when the Attorney-General moved the insertion of a new clause, giving the appellant or the Minister the right of appeal to the High Court with the leave of the High Court, on a question of law. The Attorney-General explained that the Government thought it right that where leave was given, whether the proposal was initiated by the man or the Minister, the State should pay the costs of both sides. If a man applied for leave and failed, he had to pay his own costs. Dr. MORGAN considered the clause unfair, as the cost of taking advice and making the application might be anything from eight to twenty guineas. Mr. SILKIN said that in the case of many applicants a matter of a few guineas was a very important matter. Moreover, where a tribunal refused a pension its bias would be towards refusing leave to appeal. He also suggested that it should be possible for an applicant to appear before the judge through a friend. Mr. BUCHANAN said that he had found that a judge of high standing was much more likely to give leave to appeal than an ordinary lawyer, because he had more confidence in his opinion. He had not found any tendency on the part of counsel to rush a man into court, and they often advised people to keep clear of the courts. Mr. BUCHANAN appealed to the Attorney-General to throw over any attempt to collect Government costs. Sir IAN FRASER thought that it would be a mistake to encourage an ex-service man to appeal or to encourage some solicitors, perhaps, always to advise that an appeal to the High Court with costs paid was a good thing. Dr. PETERS said that in forty years he had not charged one penny in any case of this kind, and he did not think that it was the practice of solicitors to do so. In reply, the Attorney-General said that it was undoubtedly unusual, but it was right and proper that in cases of that kind, if leave was given, the taxpayer should pay the costs of either side, but it was unreasonable for the taxpayer to pay where no leave was given, as he believed that tribunals would have no reluctance to operate the clause if they were satisfied that there really was a point of law. The Bill was read a third time and passed on 22nd July.

Post-War Housing.

IN a speech at the Building Congress at the Central Hall, Westminster, on 21st July, 1943, the MINISTER OF HEALTH said that housing in peace-time provided work for about one-half of the building industry. He would never forget that only 715 houses were built in the first year after the last war and less than 30,000 in the second year, and that little or no slum clearance was carried out for many years after 1919. But between 1919 and 1939 four million houses (three million by private enterprise and one million by local authorities) were built, and during the last few years before this war they were being put up at the rate of nearly 350,000 per year. Over 337,000 slum houses were closed or demolished and more than 315,000 families re-housed in new and better homes in the great slum clearance campaign begun in 1933. When war came the Government gave the highest priority to the first-aid repair of war-damaged houses. This repair made tremendous demands on labour and materials. Over two and three-quarter million war-damaged houses had been "first-aid repaired," and more than one million of these houses had received extended repairs. Apart from first-aid repairs, the fullest use of existing accommodation had been made and millions of evacuees, homeless and transferred war workers had been moved with little or no demand on building labour and materials. In the main he had relied on billeting, but he had requisitioned over 50,000 dwellings for housing purposes. The scheme to build in present abnormal circumstances 3,000 houses scattered over 380 rural districts and 1,000 sites was necessary to house certain essential farm workers. The information and experience which was now being gained from the farm cottage scheme would be profitable later. The first task in the post-war world would be to see war-damage repairs completed and arrears of ordinary maintenance and repair overtaken without which existing houses would reach the point when they were irreparable and lost for ever. The next was to meet the growing needs of the population for new houses, so that every family who so desired would be able to live in a separate dwelling. To meet housing needs, the repair and maintenance work should be brought up to date in the earlier years after the war, and three to four million houses built in the first ten to twelve years of the peace. This would mean building new houses at an average rate of twice the rate during the twenty inter-war years, but—and this was important—at not much above the average rate during the last few years of the peace. To do this we must consult our experience during the fruitful years 1935 to 1939, and re-establish the conditions which then existed—an abundant supply of materials, a large building industry composed of firms of varying sizes, large, medium and small, few controls, a reasonable rate of interest and a joint attack, each in their own field, by private enterprise backed by the building societies and by local authorities, who in partnership with the Government concentrated in the main on the building of houses for slum replacement and the abatement of overcrowding. Referring to work done by the Government up to date, he said that they had done more than merely sending in

estimates. He had in March last circularised local authorities asking them to decide, in conjunction with the regional planning officer and, where agricultural land was involved, with representatives of the Ministry of Agriculture and Fisheries, on sufficient suitable sites for a one-year programme. He informed them, with ready approval of the Chancellor of the Exchequer, that he was able to sanction the raising of loans for the purpose, and he indicated his willingness to entertain compulsory purchase orders. Further, he requested the authorities to begin immediately after the selection of the sites on the preliminary work of surveying and of preparing the general lay-out, so that it could be further filled in when the manual of post-war house plans and design was issued. He emphasised that local authorities must be ready to go ahead with a substantial programme immediately conditions permit. Up to date, replies from 586 local authorities, whose proposals related to the provision of nearly 130,000 houses, had been received. We could be confident that we should have three or four million houses more, we should have a bigger (though small) and better organised building industry, we should have the tried machinery of private enterprise and local authority building—there was practically no building by local authorities before 1919—and we should have a building society organisation which had grown out of all knowledge since 1919. The Minister concluded by saying that there was no reason why the tried agencies, if we all kept our heads and hearts, should not build the houses we needed.

The Beveridge Report and Friendly Societies.

THE National Conference of Friendly Societies published on 1st July a statement of the fundamentals on which they would be prepared to collaborate in the administration of any new scheme of insurance. These are (1) the scheme must be capable of responsible administration by the friendly societies; (2) it must provide for effective self-government by members of the society; (3) the rates of benefits and contributions provided by the scheme must be such as to allow a reasonable margin for State insurance; (4) there must be direct contact between societies and the insured population; (5) medical certificates should be issued free of charge to insured persons. It is added that it would be unjustifiable to throw unnecessary financial burdens upon the State by the creation of entirely new machinery when there is existing machinery capable of administering a new scheme. The suggestion is therefore made that disability, industrial disability and maternity benefits, and maternity marriage and funeral grants be administered through the medium of approved agencies of the State and that every insured person should have complete freedom of choice of "approved agency," and the right to transfer from one agency to another if he so desires at such recognised periods as the appropriate Minister shall determine. Any body consisting of not less than 5,000 members may be authorised by the appropriate Minister to act as an "approved agency" of the State, provided that the Minister is satisfied: (*a*) That the body has efficiently administered a scheme of sickness insurance (either on a voluntary basis or under a State compulsory scheme) for a period of not less than twenty-five years; and (*b*) that the affairs of the body are subject to effective self-government by its members. Where a body of fewer than 5,000 members fails to amalgamate with another body within a prescribed period the members shall be allocated by the Minister to an approved agency. The functions of "approved agencies" are to be (*a*) to receive State contribution cards from its members, and record in such manner and to such extent as the Minister may determine payments made by, or in respect of its members; (*b*) to authorise and pay all claims made by its members in respect of the "cash benefits" enumerated in the statement, and such other benefits as the Minister may from time to time determine, without reference to any other authority; for this purpose insured persons to be entitled to receive upon application and without charge such medical and other certificates as may be necessary to establish title to benefit; (*c*) to administer an effective system of sickness visitation among its members; (*d*) to submit its accounts in respect of payments made on behalf of the State to auditors appointed by H.M. Treasury; (*e*) generally to comply with any regulations issued by the appropriate Minister affecting "approved agencies." Remuneration, it is suggested, should be given to an approved agency on a *per capita* basis for the members for whom it acts as an agent of the State in respect of "cash benefits." This, it is argued, will obviate the creation of any new machinery and prevent any unnecessary additional expenditure being thrown upon the Exchequer. The proposals are a constructive and well thought out contribution to the discussion on the subject, and will no doubt receive full consideration by the Ministers concerned.

Draft Agreement on Post-War Relief.

THE United Nations have now formally determined that immediately upon the liberation of any area by the armed forces of the United Nations the population shall receive relief, and that arrangements shall be made for the return of prisoners and exiles to their homes and for the full resumption of production and essential services. To that end the draft agreement recently sent to all members of the United Nations establishes the United Nations Relief and Rehabilitation Administration, with "power to acquire, hold and convey property, to enter into contracts and undertake obligations, to designate or create agencies, and to review the activities of agencies so created, to manage undertakings, and in general to perform any legal act appropriate to its objects and purposes." The form of activities of the Administration within the territory of a member government wherein that government exercises administrative authority, and the responsibility to be assumed by the member government for carrying out measures planned by the Administration is to be determined after consultation with, and with the consent of, the member government. Any governments or authorities other than the United Nations may be admitted to membership on application. The Central Committee is to consist of the representatives of China, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America, but it must invite the participation of the representatives of any member government at those of its meetings at which action of special interest to such government is discussed. There will also be a Committee of the Council on Supplies representing those member governments likely to be principal suppliers of material for relief and rehabilitation, a Committee of the Council for Europe to replace the Inter-Allied Committee on European post-war relief established in London on 24th September, 1941, and a Committee of the Council for the Far East. The Council may appoint other regional and technical standing committees. The executive authority of the Administration is to be vested in a Director-General, to be appointed by the Council on nomination by the unanimous vote of the Central Committee. He must make periodic reports to the Central Committee and to the Council and his reports are to be made public, except for such portions as the Central Committee considers it necessary, in the interests of the United Nations, to keep confidential. The setting up of the Administration is the first step towards the mighty task of achieving a world free from want. This can be achieved if the peoples and governments of the world wish it, and the pledge in the draft agreement by each member government to give its "full support to the Administration within the limit of its available resources and subject to the requirements of its constitutional procedure" is a security that it will be achieved.

Limitation of Supplies.

THE Board of Trade announce that the Limitation of Supplies (Miscellaneous) (No. 21) Order (S.R. & O., 1943, No. 909, price 4d.), which covers the six months 1st August, 1943, to 31st January, 1944, is now on sale. The Home Trade Register will not be revised during this restriction period, so that all persons whose names were on the register from 1st March, 1943, are again to be considered as registered persons for the purposes of analysing sales in the standard period, which will be as before, the year ended 31st May, 1940. This order contains a definition of the classes of persons to be regarded as manufacturers and also provides that where persons manufacture goods on commission, i.e., from materials belonging to another trader, the value of controlled goods produced from such materials does not count against their quota but against that of the trader owning the materials. Further, whereas in the past individual directions have been sent to persons who have been "deregistered" during the restriction period, requiring them to inform their suppliers of the fact before placing further orders with them, they are now specifically obliged to do this by the order itself. Among the changes made by the present order, one which will give relief to large numbers of people is that under Class 9c (cutlery, spoons and forks); the quota has been raised from 10 per cent. to 15 per cent., not more than one-half of which may be supplied before 1st November, 1943; and razors and safety razor blades and holders may be supplied in excess of quota by registered persons. Manufacturers may not, however, supply to unregistered persons a greater proportion of their sales of blades to both registered and unregistered persons than in the standard period. The heading "Toys" has now been amplified to make the scope of this class plainer. Traders are advised to reconsider the position of articles which have hitherto been regarded as uncontrolled, and in cases of doubt they are recommended to consult the Board of Trade.

Recent Decision.

On an appeal from an order by a registrar of the Divorce Division on 21st July (*The Times*, 22nd July), the President held that, in assessing the income of a squadron leader in the Royal Air Force for the purpose of deciding what maintenance he should pay his wife, his net allowances should not be grossed up with his service pay so as to represent income liable to tax, but must only be taken into account as one of the circumstances to be considered in computing a husband's income. The court had to consider the husband's ability to pay and this was increased by the fact of his receiving allowances. The significance of the allowances, his lordship said, was that they enabled the respondent to live in service conditions, and freed his pay so that, without any substantial call for his own living expenses, he could devote his pay to the maintenance of the petitioner (his former wife) and his present wife.

Conviction Inadmissible in Civil Proceedings.

THE characteristically clear and reasoned judgment of Goddard, L.J., delivering the judgment of the Court of Appeal (Lord Greene, M.R., Goddard and du Parcq, L.JJ.) in *Hollington* v. *F. Hewthorn & Co., Ltd.* [1943] 2 All E.R. 35, 38–44; 87 SOL. J. 247, is of high importance in the modern law of evidence. It contains not merely a terse and significant review of some of the main authorities and a criticism and disapproval of three recent decisions of the Probate, Divorce and Admiralty Division, but a rationalising, a restatement in modern terms, of the basis of a rule of evidence which, on the face of it, appears artificial and, indeed, somewhat antiquated. Yet, with respect, this is a matter which we hope that the House of Lords will one day consider. (In the present case no leave to appeal was given.)

That rule is this. A conviction is inadmissible in evidence—even as *prima facie* evidence—in civil proceedings. This class of evidence has been "invariably" rejected for many years.

> ". . . where it is clear that over a long period there has been a unanimous opinion, not only of most modern text-book writers, but among judges of first instance, that some particular class of evidence is inadmissible the court should be slow to differ from it unless it can be clearly shown that the *communis opinio*, which we are satisfied has hitherto prevailed, is based on wrong premises" (at p. 39).

A motor car owned by the plaintiff and driven by his son collided with a car owned by the company. Since action the son died, but not from the accident, and the action continued by H, his administrator, for damages for injuries suffered by the son, and for damage to the car. Hilbery, J., gave judgment for H, and the defendant appealed. The plaintiff argued that if the Court of Appeal should hold that there was no evidence to support the judgment, there should be a new trial at which he could give certain evidence that Hilbery, J., rejected. Only the two drivers saw the accident; the one was dead, the other was not called. The constable could only speak of the cars as he saw them after the accident. Each car was on its proper side of the white line; there were no marks on the road; the plaintiff's car was damaged right across the front; both cars were level. Hilbery, J., found that the defendant was on his wrong side, and that, in endeavouring to swerve to his near side, went across the front of the plaintiff's car. The Court of Appeal held that the damage was consistent with either car being at fault. On the evidence, negligence could not be supported.

Evidence had been tendered that on the day of the accident and in the same parish the defendant's driver had been convicted of driving without due care and attention. A signed statement made by the deceased driver to the constable soon after the accident was also submitted as admissible under Evidence Act, 1938, s. 1 (3). Hilbery, J., rejected both these documents—rightly, the Court of Appeal held.

It was contended that the conviction was *prima facie* evidence of the defendant's negligence, once it was proved that the defendant was the person convicted and that the same negligent driving was the subject-matter of both proceedings. The defendant, it was admitted, would then be at liberty to show that he should not have been convicted or that the negligence of which he was convicted did not cause the accident.

INADMISSIBLE BECAUSE IRRELEVANT.

Goddard, L.J., considered the question in the light of the principles of modern law relating to evidence. *Earlier law paid more attention to competency than to relevance* (at p. 39). It was only in 1853 that husbands and their wives were enabled to give evidence. Hence the law of competency was the most important part of the law of evidence.

> "Nowadays, it is relevance and not competency that is the main consideration; and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded" (*ibid.*).

The question, then, is this: Is a conviction for driving without due care and attention relevant to an issue whether the defendant negligently collided with and injured the plaintiff? (*ibid.*) The conviction merely proves another court's *opinion*, i.e., that the defendant drove carelessly. The civil court would know merely the conviction; of the evidence, the arguments and the weight that the criminal court attached to the evidence severally, it knows and could know nothing. Nor is the issue in both proceedings identical. If the conviction were admissible in the civil proceedings and the defendant challenged it, the court would, in effect, have to re-try the criminal case. The opinion of a witness is irrelevant.

> "On the trial of the issue in the civil court, the opinion of the criminal court is similarly irrelevant" (at p. 40).

Further, only the best evidence is admissible. Subject to certain well-established exceptions, the death of a witness does not render admissible evidence that, were he alive, would be objectionable.

A conviction has been regarded as inadmissible on the ground that it is *res inter alios acta*. In the case of a private prosecution, the Crown is merely the nominal prosecutor. Hence, said Goddard, L.J., the court stresses—

> "relevancy that lies at the root of the objection to the admissibility of the evidence" (*ibid.*).

A judgment by A against B, though evidence against all parties claiming under it, should not be evidence against C, for C has had no opportunity to make a defence, to examine witnesses or to appeal (*Duchess of Kingston's Case* (1776), 2 Smith L.C. 644, 645). This applies both to convictions and to civil judgments. "A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects, when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay £*x* to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C. But it is not evidence that B was negligent (see *Green* v. *New River Co.* (1792), 4 Term R. 589) and B can show, if he can, that the amount recovered was not the true measure of damage" (at p. 41 (1943), 2 All E.R.).

THE AUTHORITIES.

Goddard, L.J., proceeds to give some useful citations from the old treatise on the law of evidence, and he examines chronologically the older and more recent authorities (at p. 41). Starkie is cited, as saying:—

> "As a general rule it seems that a verdict or judgment in a criminal case is not evidence of the fact upon which the judgment was founded in a civil proceeding."

The authority that author quoted was *R.* v. *Warden of the Fleet* (1698), 12 Mod. Rep. 337, where it was held that a conviction was no evidence against the warden upon a debt on a bond, nor for the prisoner in false imprisonment against the warden, because the parties were different. In *Hillyard* v. *Grantham* (1727), cited 2 Ves. sen. 246, in a legitimacy question in the King's Bench, the sentence of a consistory court that the parents had lived in fornication was not admitted because it was a criminal matter, and because it was *res inter alios acta*. In *Castrique* v. *Imrie* (1870), 4 H.L. 414, Blackburn, J., in his opinion to the House of Lords, said that a conviction for forging a bill was not only not conclusive, but was not even admissible evidence of forgery in an action on the bill. In *March* v. *March* (1858), 28 L.J.P. & M. 30, Sir Creswell Creswell, giving leave in a divorce petition to prove bigamy by affidavit, said: "Remember the bigamy must be proved. Proof of the conviction for bigamy will not suffice." If the defendant, on his trial, had pleaded guilty, evidence by a witness of his confession would be evidence against him in the civil proceeding.

CERTAIN CASES DISAPPROVED.

Goddard, L.J., next discusses three modern decisions in the Probate, Divorce and Admiralty Division. In *Re Crippen* [1911] P. 108, where it was sought to pass over the legal personal representatives of the husband, Sir S. Evans, P., admitted the conviction of Crippen for the murder of his wife as proof of murder. Goddard, L.J., did not think that the authorities justified in admitting the conviction as proof that the husband had murdered his wife (at p. 43 of (1943), 2 All E.R.). In *Partington* v. *Partington and Atkinson* [1925] P. 34, a husband, previously found guilty as a co-respondent, petitioned for divorce. In this suit, counsel for the co-respondent put in, without objection, the decree in the former suit. Horridge, J., admitted the decree as evidence, though not as an estoppel, and allowed the petitioner to give evidence denying the adultery previously found against him. In *O'Toole* v. *O'Toole* (1926), 42 T.L.R. 245, Hill, J., admitted as evidence of adultery the respondent's conviction for perjury, in falsely swearing that he had not had connection with a certain woman. "In our opinion," said Goddard, L.J., "these three cases go beyond and are contrary to the authorities and ought not to be followed in future" (at p. 43 (1943), 2 All E.R.). If a conviction could be admitted, not as an estoppel, but as *prima facie* evidence, so ought an acquittal: "and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without re-trying the criminal case" (*ibid.*).

SHOULD CONVICTIONS AND DECREES NISI BE EVIDENCE?

Goddard, L.J., refers to a note in 42 L.Q.R. 144, suggesting that these three cases could be supported on the ground, *omnia præsumuntur rite esse acta*: the State has an interest in seeing that the truth of the facts at the basis of convictions and decrees *nisi* is established. "If such an exception is made," observed the learned lord justice, "it ought to be by legislation and not by judicial decision" (at p. 43 of (1943), 2 All E.R.). Moreover, the King's Proctor can inquire only into a very small proportion of divorce cases. And why should a decision in a criminal court have "greater evidential value" than one in a civil court? Moreover, "if a conviction for murder is admissible, so must one be for a motoring or licensing offence"; has the State an interest in these summary convictions? Where a conviction is questioned, only a re-trial on the same evidence can decide its value.

> "However convenient the other course may be," said Goddard, L.J., "it is, in our opinion, safer in the interests of justice that on the subsequent trial the court should come to

a decision on the facts placed before it, without regard to the result of other proceedings before another tribunal" (*ibid.*, at p. 44).

AN INADMISSIBLE STATEMENT.

A final point was: Should the statement made by the deceased to the police constable have been admitted under the Evidence Act, 1938? By s. 1 (3) a statement by a person *interested* when proceedings are pending or *anticipated*, involving a dispute upon a fact which the statement might tend to establish, is inadmissible. It is not the law that a statement to a constable who is inquiring into a road accident is never admissible: it depends upon whether the writer is "interested" and whether proceedings are "pending" or "anticipated." This is not the effect of *Robinson* v. *Stern* [1939] 2 K.B. 260, where, under s. 1 (5), the court, as it is permitted to do, looked at the statement and drew the inference that the defendant must have anticipated proceedings. In the present case the deceased must have "anticipated" the likelihood at least of civil proceedings; the statement was accordingly inadmissible. The appeal was allowed and judgment entered for the defendant.

A Conveyancer's Diary.

Soldiers' Wills.

FROM time to time during the war I have written about the special testamentary privileges of soldiers, mariners and airmen. *In the Estate of Rippon* [1943] P. 61, is one more of the few cases so far reported since 1939. The privilege is now based on s. 11 of the Wills Act, 1837, which provides that "any soldier being in actual military service or any mariner or seaman being at sea may dispose of his personal estate as he might have done before the making of this Act." The Wills (Soldiers and Sailors) Act, 1918, put realty on the same footing as personalty and included airmen within the meaning of "soldier." Further, it gave to the navy and marines the same privileges when not actually at sea as they would have had if they had been soldiers. The upshot is that the privilege extends to any soldier, airman, sailor of the Royal Navy, or marine who is "in actual military service." It is that expression which is the subject-matter of *Re Rippon*.

Section 11 of the Wills Act replaces a section in the Statute of Frauds which was to the same effect, but there do not appear to be any important cases on it, or its predecessor, until the middle of the nineteenth century. Blackstone quotes none at all, and merely states the privilege without comment in the chapter on Wills in his second volume. The words "in actual military service" were for the first time closely considered by Sir Herbert Jenner Fust in *Drummond* v. *Parish* (1843), 3 Curt. 522, where the question was whether the privilege was possessed by a major-general in respect of a will made while he was quartered at Woolwich in time of peace. Clearly it would have been going too far to say that every soldier on full pay in the service of the Crown had such a privilege independently of his being or expecting shortly to be engaged upon duties of a war-like character. The operative passage of the judgment was as follows: "Being of opinion from the result of the investigation of the authorities, that the principle of the exemption . . . was adopted from the Roman law, I think that it was adopted with the limitations to which I have adverted, and that, by the insertion of the words 'actual military service,' the privilege, as respects the British soldier, is confined to those who are *on an expedition*." The last three words are a literal translation of the Latin expression "*in expeditione*": in my opinion it is more convenient to use the Latin, since it will thus be easier to remember that the phrase is a term of art.

There were a few cases on this point caused by the South African war. Thus, *In the Goods of Hiscock* [1901] P. 78, concerned a printer's apprentice who volunteered for active service. (He was previously a member of a volunteer battalion, not liable to be called up for active service except in case of the invasion, or apprehended invasion, of this country.) Having volunteered to go on active service, he reported at Chichester barracks, where he stayed for a few weeks until he sailed for South Africa. He made the will in question two days before he sailed, early in March, 1900. The will was held valid on the ground that the deceased had taken "a first step towards joining the field forces." The learned President, Sir F. H. Jeune, pointed out that the step may well be a small one, instancing the case of a man, in time of invasion, who is living at Dover and is called upon to go into the fortifications of Dover and assist in the defence. The other case was *Gattward* v. *Knee* [1902] P. 99, where the will propounded was made when the testator, a regular soldier, was just about to start with his regiment from India, where it had been stationed, for South Africa. The date of the will was in September, 1899, war not having been declared, I think, till October. This will was also held good, on the express ground that "mobilisation . . . may fairly be taken as a commencement of that which in Roman law was expressed by the words '*in expeditione*.'" I do not think that *Gattward* v. *Knee* is authority for the proposition that everyone who has been affected by mobilisation is within the privilege, especially as "mobilisation" has not a fixed meaning, but that is one way of getting within it.

The difficulty in *Re Rippon* arose from the fact that a good many soldiers in reserve or auxiliary forces were called out for service in 1939 *before* general mobilisation. Major Rippon was before the war an officer in the Territorial Army. He was "called out for service" under directions given by the Secretary of State for War on 22nd August, 1939, in accordance with s. 1 of the Reserve and Auxiliary Forces Act, 1939, the Secretary of State being satisfied that the service of the members of the reserve and auxiliary forces was urgently required for insuring preparedness for the defence of the realm against external danger." Before leaving home on 25th August, 1939, Major Rippon made the informal will which was propounded. He then joined, at Lee in Kent, the battery which he commanded. On 1st September the Territorial Army was "embodied"; on 2nd September it was "mobilised"; on 3rd September war was declared. Major Rippon was killed in action in France in May, 1940.

In a reserved judgment, Pilcher, J., granted letters of administration with the will annexed, in respect of the will of 25th August, 1939. Having referred to *Drummond* v. *Parish* and the South African war cases, he mentioned that in at least one case a testator had been entitled to make a privileged will at a date when this country was not at war. (That was *Re Limond* [1915] 2 Ch. 240, where the testator was engaged in delimiting the Indian frontier *after the conclusion* of the Waziristan operations of 1895. He was attacked and killed by a casual fanatic.) Pilcher, J., observed that the situation in the last week of August, 1939, was highly unusual in that war was believed to be imminent and "many instructed persons took the view, not perhaps unreasonably, that this country might be heavily bombarded from the air, and, possibly, invaded, without any formal declaration of war. In these circumstances the Secretary of State, in pursuance of his statutory powers, caused Major Rippon to be called out for service because his services as a battery commander in Kent were urgently required for ensuring preparedness for the defence of the realm against "external danger," a term connoting, in his lordship's view, invasion or aerial bombardment. Finally, the learned judge pointed out that the order of 2nd September for general mobilisation provided that persons in Major Rippon's position should stay where they were and "the general mobilisation did not in any way affect the activities in which Major Rippon had for the last week been engaged."

This case is, I think, of some importance. A good many persons must have made informal wills in the last week of August, 1939, after being "called out for service," but before mobilisation. Most of these persons must, happily, be still alive. But the fact that they have since had ample time to make proper wills does not affect the validity of the informal one. It will be remembered that the informal will which was admitted to probate in *In the Estate of Booth* [1926] P. 118, had been made in 1882 when the testator was just starting forth to deal with Arabi Pasha. The testator survived that expedition by over forty years. The effect of *In the Estate of Rippon* is that *prima facie* an informal will is valid if made, after "calling out," by a person who was still with the colours at the date of general mobilisation. Anyone who has actually made such a will should be advised to revoke it and make an ordinary one. Hurried dispositions are not always wise, and informal wills are in any case a nuisance to prove and administer.

But I think the reasoning carries us a stage further. Major Rippon was still with the colours on 2nd September and his pre-war service merged into his active service without a break. Pilcher, J., mentioned this point, but did not rely on it. The real basis of the decision is that an unheralded air attack was expected at any moment and forces were standing by to repel it. (I doubt if many persons really expected invasion at that date.) This state of fact was clothed with legal form by the Reserve and Auxiliary Forces Act, 1939, and arrangements made thereunder. But those facts did not only exist in the final crisis. They had been more or less continuous, at least since the previous March. The Reserve and Auxiliary Forces Act became law on 25th May, 1939, and to my knowledge, a number of persons were called out under it for periods of service in June and July, but returned home between then and the end of August. The Act has a preamble which states that "a situation has arisen in which it is necessary that His Majesty should be empowered, whenever the service of members of His reserve and anxiliary forces is urgently required for ensuring preparedness for the defence of the realm against external danger, to call out for service such of them as may be needed." In view of this preamble it would, I think, be difficult to say that any person who was called out for service at any date after 25th May, 1939, under s. 1 of this Act (which gives the powers foreshadowed by the preamble) was not, while so called out, *in expeditione*.

Books Received.

A Guide to Land Registry Practice. By JOHN J. WONTNER. Fifth Edition, 1943. Demy 8vo. pp. 140 (including Index). London: The Solicitors' Law Stationery Society, Ltd. 17s. 6d. net.

Contracts and Contacts. By Ernest Fox, F.S.I., 1943. Demy 8vo. pp. 117. London: "The Estates Gazette." 7s. 6d. net.

Landlord and Tenant Notebook.

Meanings of "Separate Dwelling" and "Family" in Rent, etc., Restrictions Acts.

ANSWERING a question in the House of Commons the other day, the Minister of Health said that the particular estimate he was asked to give "must depend on such factors as a definition of the family and of a separate dwelling." It was, he added, accordingly not possible to be precise.

I think the question was a "supplementary" one and that the "Joad-like" character of the answer was due to Mr. Brown having no time to consult officers of his department familiar with housing law in general and with the Rent, etc., Restrictions Acts in particular. If he had, he would no doubt have been told that the expression "separate and self-contained flats or tenements" (Increase of Rent Act, 1920, s. 12 (9): decontrol by conversion) was twice judicially interpreted as long ago as 1923: in *Smith* v. *Prime*, 39 T.L.R. 403, and (a fortnight later) in *Darrell* v. *Whitaker*, *ib.*, 447. I do not, of course, suggest that the interpretations would have been adopted for present or future purposes. "Flat or tenement" has a different connotation from "dwelling," and as the subsection is one of those which do not apply to "1939" houses, and as building restrictions hardly encourage its exploitation in the case of other controlled properties, a discussion of the decisions at any length would be out of place. But the two reports do, it may be mentioned, give us three interesting, analytical judgments and contain much matter that may some day be of use both to lawyers and to law-makers. Suffice it to say that Lush, Roche and McCardie, JJ., substantially agreed that to be "separate" a flat or tenement need not be physically separated from its neighbour, and to be self-contained it should contain within its ambit all that is reasonably necessary for the class of tenant likely to occupy.

"Family" also occurs in the Increase of Rent, etc., Acts: twice, and without definition. The vexed question of what could happen when a statutory tenant died was solved by making the expression "tenant" include "the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court"—thus the 1920 Act, s. 12 (1) (*g*), as amended by the Increase of Rent, etc., Act, 1935, for the original enactment stipulated that the tenant should die intestate, thus providing fuel for the argument that his estate could be disposed of by will. Widowers have been held to qualify; so have brothers and sisters; and there is an unreported decision to the effect that a niece by blood is a member of the tenant's family. Presumably this was a case of a daughter of a brother or sister of the tenant, but I have heard it suggested that it would include a brother or sister of the tenant's wife or husband, "by blood" merely signifying that it was not the wife of a nephew. At all events, all possibilities do not appear to have been explored yet.

But of rather wider importance is what is the meaning of "family" in the Rent, etc., Restrictions (Amendment) Act, 1933, s. 3 (2) (*b*) (i) and (ii), enacting that "alternative accommodation" must be either (i) similar as regards rental and extent to the accommodation afforded by dwelling-houses provided . . . for persons whose needs as regards extent are . . . similar to those of the tenant and his family, or (ii) otherwise suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character.

We have as yet no authority on what may be covered by the word "family" in these sub-paragraphs, and in this case the problem would seem to be similar to that which recently confronted, and may again confront, the Minister. I think it right to say that the decisions under s. 12 (1) (*g*) are not likely to prove much use, the objects of the two provisions being so different; the one provides for a family without a tenant, the other for a tenant with a family.

Some *obiter dicta* which I recently heard uttered by a county court judge are certainly provocative of thought on the subject. The case was one in which the defendant tenant pleaded that accommodation offered was not suitable to the needs of himself, his wife, and his wife's niece as regards extent, and it appeared that the niece, whose husband was in one of the Forces, had come on a visit and then arranged to stay "for the duration." The learned judge actually decided against the landlord on the ground that it would not be reasonable to make an order, but took the opportunity of expressing some views on what was meant by "family." According to these, consanguinity had little or nothing to do with the matter. The underlying idea was that the tenant should have accommodation not only for himself, but also for those who resided with him in the house claimed. "His family" might, therefore, exclude persons closely related; but might, the learned judge thought, include in some circumstances persons who were not related to the tenant at all.

No doubt this was the idea, and no doubt it is one difficult to express in the form of a definition. On this point, at all events, I agree with the observation made by the Minister; it is not possible to be precise.

The Rent Restrictions Act Poster.

It may be recalled that in response to agitation the Minister of Health recently undertook to issue a poster summarising the penal provisions of the Rent, etc., Restrictions Acts. Copies of the resultant work have now been affixed to walls in all parts of the country. While it concludes with the statement that inquiries about the reader's position may be made of the local town clerk, it is possible that perusal may in some cases lead to advice being sought of solicitors, and for this reason the poster merits a short notice in this "Notebook."

As regards style, all I need say is that it is an excellent example of that précis-writing for which our civil servants are famous. The omission to mention the sources of the rules summarised is, no doubt, deliberate; citation of chapter and verse would defeat the object by irritating the reader of the poster. But readers of this journal who may be consulted about it may have to refer to the relevant enactments.

The two main paragraphs of the poster deal with "unfurnished premises" and "furnished premises" respectively. The former covers the duty to supply a statement of the standard rent, and to state the standard rent in the rent book if rent is collected weekly, and mentions the prohibition of premiums or "key money."

The source of the duty to supply a statement in writing as to what is the standard rent is s. 11 of the 1920 Act. The duty is qualified in that "reasonable excuse" is a defence. Regulations made under s. 14 of the amending Act of 1933 oblige landlords to insert statements of the standard rent in rent books, though it was not till 1938 that landlords of "weekly property" were actually placed under a statutory duty to provide rent books "or similar documents" (1938 Act, s. 6).

Premiums were prohibited by s. 8 of the 1920 Act, and practitioners likely to be consulted about "what is a premium" would do well to have a report of *Rush* v. *Matthews* [1926] 1 K.B. 492 (C.A.) handy.

The "furnished premises" paragraph summarises the provisions of s. 10 of the 1920 Act, as amended by the 1939 Act, s. 3 (1), and Sched. I, and if the tone of the summary is slightly minatory, this is presumably in keeping with its object. Only cynics might suggest that terror tactics are being employed because of the omission of even an attempt to define the term "extortionate."

Correspondence.

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL.]

A Witness for the Prosecution.

Sir,—The following observations of Lewis, J., reported in *The Times* of the 15th July [see *ante*, p. 262]—

"For a solicitor, or his clerk, when instructed by a prisoner to interview a witness for the prosecution is most reprehensible" seem to raise an important question.

I would respectfully suggest that the law knows of no such person as "a witness for the prosecution." It is the legal duty of *every* person who knows any relevant facts to assist the *court itself* by his evidence, irrespective of whether such evidence may assist the prosecution or the defence.

It is equally the right, and indeed the duty, of the legal advisers on either side to ascertain what evidence such person can properly give.

In many cases it might lead to a miscarriage of justice if the legal adviser on one side is to be prevented from taking a statement of evidence from an otherwise qualified witness merely because such potential witness has received a subpœna to give evidence at the instance of the other side. The only duty which the legal adviser owes is to be very careful to avoid the serious offence of endeavouring to persuade the prospective witness to omit relevant evidence or to put forward false evidence.

London, E.C.4. CHARLES L. NORDON.
20th July.

Obituary.

MR. H. M. FARRER.

Mr. Harold Marson Farrer, solicitor, of Messrs. Farrer & Co., solicitors, of Lincoln's Inn Fields, W.C.2, died on Monday, 19th July, aged sixty-one. He was educated at Eton and at Balliol College, Oxford, and was called to the Bar in 1907. He was admitted a solicitor in 1914. Mr. Farrer was Chairman of the Law Fire Insurance Society and a director of the Equity and Law Life Assurance Society.

MR. G. L. F. MCNAIR.

Mr. George Lewis Frederic McNair, solicitor, of Messrs. Thomas Cooper & Co., and Messrs. Stibbard, Gibson & Co., solicitors, of St. Mary Axe, E.C.3, died on Sunday, 25th July, aged eighty-six. He was admitted in 1892.

To-day and Yesterday.

LEGAL CALENDAR.

July 26.—In 1832 a feud was in progress between Lord Brougham, the Lord Chancellor, and Sir Edward Sugden, the foremost practitioner in his court. One point in dispute was the question of the Chancery sinecures. Two such offices had fallen vacant and been filled by Brougham's brother, and Sugden in the House of Commons asked a question on the matter. On the following day, the 26th July, the Lord Chancellor, while Sugden was addressing him, rose suddenly without any intimation and left him standing, in the middle of a sentence. That evening he made a speech in the House of Lords vindicating his conduct and making a bitter reference to Sugden: "We have all read that it is the heaven-born thirst for information and its invariable concomitants, a self disregarding and candid mind, that most distinguishes man from the lower animals—from the crawling reptile, from the wasp that stings and from the wasp that fain would, and cannot, sting—distinguishes us, my lords, not only from the insect that crawls and stings but from that more powerful, because more offensive creature, the bug . . . Yes, I say, it is this laudable propensity upon which humanity justly prides itself, which, I have no doubt, solely influenced the learned gentleman to whom I allude to seek for information."

July 27.—On the following day, the 27th July, the court was crowded by those anxious to witness a clash between judge and counsel, but Brougham never raised his eyes from his notebook and Sugden argued in a tone of independence and dissatisfaction. Two years later they were reconciled.

July 28.—Mr. John Carden and Captain Gough were neighbours in Tipperary. Mr. Gough fell in love with Miss Eleanor Arbuthnot, the captain's sister-in-law and proposed marriage, but was indignantly rejected and social intercourse between them was broken off. Nevertheless, he continued to pester her with his attentions to the point of persecution, and when he was still repulsed he determined to abduct her. One day while she and three other ladies were driving back from church at Rathronan they were ambushed by Mr. Carden and several hired assistants. The reins of the carriage horse were cut and to get at Miss Eleanor he had to pull the other ladies out by main force. They resisted valiantly and so did the object of his abduction, clinging to a strap in the vehicle till it gave way and having most of her clothes torn off. The battle, however, gave time for help to come up. Mr. Carden's men, though ordered to shoot, refused, and he and they fled in their carriage. After a hot pursuit it was ditched and he was captured. Firearms and chloroform were found inside. On the 28th July, 1854, he was tried before Ball, J., at Clonmel Assizes. The court was crowded for, strangely enough, he had attracted great public sympathy. A doubt having been raised whether merely dragging the lady out of the carriage was sufficient to support the charge of abduction, the Crown agreed to accept a plea of "Guilty" to a charge of attempted abduction. He was sentenced to two years' hard labour.

July 29.—On the 29th July, 1747, "Cook and Ashcroft, two smugglers, were conveyed from Newgate under a guard of soldiers to Tyburn, there executed and afterwards hung in chains at Shepherd's Bush."

July 30.—On the 30th July, 1746, the Earl of Kilmarnock, the Earl of Cromarty and Lord Balmerino, having been found guilty by their peers of high treason, were asked what they had to say why sentence of death should not be pronounced against them. All three had been deeply involved in Prince Charlie's rising. The first acknowledged his fault and threw himself on the King's mercy, pleading his former lifelong loyalty. The second took the same line. The third urged a technical objection to the indictment. They were all condemned to death, but Cromarty was eventually pardoned.

July 31.—One day Giles Lord, a coachman, received a mysterious box left for him at The Frightened Horse, at Hands-worth. In it was an oblong tin box which did not open readily, although he pulled the handle. Fortunately, something gave way inside and the lid opened of itself. Inside were some dangerous fireworks, "Waterloo bang ups," so arranged that had the handle been used they would have exploded. Clues led to John Mountford, a tenant of Lord's, who had had a dispute with him. He was tried at Stafford on the 31st July, 1834, and found guilty of attempting to murder Lord by the discharge of firearms, but Williams, J., having reserved a point of law, the judges afterwards held that the fireworks did not bring him within the Act under which he was indicted.

August 1.—Patrick Hume, Earl of Marchmont, died at Berwick-on-Tweed on the 1st August, 1724, and was buried in the Canongate churchyard at Edinburgh. He had been appointed Lord Chancellor of Scotland in 1696 and raised to the peerage in the following year. Shortly after Queen Anne's succession he was deprived of his office after he had presented an Act of Parliament for the abjuration of the Pretender couched "in the most horrid scurrilous terms imaginable."

Mr. Frederick Palin, barrister-at-law, of Epsom, left £28,625, with net personalty £28,074.

Our County Court Letter.

Apportionment of Rent.

IN *Lawrence* v. *Jewer*, at Bournemouth County Court, an application was made under the Increase of Rent, etc., Act, 1920, s. 12 (3), for the apportionment of the rent of No. 131, Redhill Drive. The applicant was the landlord, and his case was that the premises had formerly been let to a boot-repairer. That tenant had sub-let the living accommodation to the respondent at 12s. 6d. a week, when the shop closed. Nevertheless, as appeared from the evidence of a chartered surveyor, the appropriate rent would be £1 a week for the living accommodation and 10s. for the shop. The house could be let at 25s. a week, but the rent for the whole premises was not permitted to exceed 30s. a week. The respondent's case was that the shop, being licensed for boot-repairing, should bear more than 10s. of the apportionable rent of 30s. This would leave less than £1 as the rent of the house. His Honour Judge Cave, K.C., observed that, if the premises were vacant, and there were no Rent Acts, more than 30s. a week could be obtained as rent for the house and shop combined. A fair apportionment, in the present circumstances, would be £1 for the house and 10s. for the shop. An order was made accordingly. If a higher rent than 10s. were subsequently obtained for the shop, the matter might require to be reconsidered.

Wilful Damage by Tenant.

IN *Chaundy* v. *Mosby*, at Bournemouth County Court, the claim was for damages for breach of an implied agreement to use certain premises in a tenant-like manner. The plaintiff's case was that she was the owner of a dwelling-house, of which the defendant was formerly the tenant. The plaintiff had obtained an order for possession against the defendant, who vacated the premises in pursuance of the order. After his departure, however, the house was found to have suffered damage, which must have been caused wilfully. A floor-board had been removed, and the space underneath had been used as a dustbin. The switches and fuse boxes were knocked off, and the electrical repairs had cost £6 15s. Other repairs had cost £16 14s. 6d. The plaintiff had been unable to occupy the house for four weeks, while repairs were carried out. The damage claimed under this head was £4 4s. His Honour Judge Cave, K.C., gave judgment for the plaintiff for £32 16s. 6d., with costs.

Points in Practice.

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered, without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 29–31, Breams Buildings, E.C.4, and contain the name and address of the subscriber, and a stamped addressed envelope.

Notice to Quit Farm.

Q. If an agricultural holding of approximately 4 acres is sold by public auction on 20th March, 1943, and notice to quit is given by the vendor on the following day and before completion, to determine at Lady Day, 1944, is the consent of the Ministry of Agriculture and Fisheries necessary to make the notice valid and, if so, must application to the Ministry be made before the giving of the notice.

A. The consent of the Minister is necessary. Application for such consent may be made after the giving of the notice, under the proviso to reg. 62 (4A).

Acknowledgments for Production.

Q. Referring to your answer on p. 162 of your issue of the 8th May last, have you not overlooked that Opinion No. 1308 in "The Law Society's Digest" has been reversed, and accordingly an acknowledgment ought to be given by the mortgagee's personal representative? See para. 4 on p. 289 of *The Law Society's Gazette*, of December, 1939.

A. We regret we had overlooked the reversal by the Council of The Law Society of the opinion quoted by us, but at the same time retain our view that an acknowledgment in the circumstances cannot be insisted on. There may be a substantial argument in favour of such an acknowledgment in the case of a probate, as the better opinion seems to be that a mortgage can be transferred to a legatee by assent. An administrator, however, who has statutory power to pass the legal estate in land by written assent has no such power to transfer a mortgage debt. If an acknowledgment is proper, it should also be proper to decide that no assent or conveyance has been given or made.

War Damage Contribution.

Q. A mortgagor owns a dwelling-house which is now let to a private hotel proprietor and is used by such proprietor as a sleeping annex to the hotel. It is actually physically divided from it by a road. Is the mortgagee obliged to contribute the war damage contribution or is it excepted by the proviso to s. 25 (4) of the War Damage Act, 1941?

A. Provided that the contributory value does not exceed £150, s. 25 (4) applies in order to make the mortgagee liable to indemnify the mortgagor because the premises are "suitable for use for residential purposes" within the meaning of the subsection.

Notes of Cases.

COURT OF APPEAL.

Leighton's Investment Trust, Ltd. *v.* Cricklewood Property and Investment Trust, Ltd., and Others.

Scott, MacKinnon and du Parcq, L.JJ. 4th June, 1943.

Contract—Frustration—Ninety-nine years' building lease—Whether doctrine of frustration applicable.

Defendants' appeal from a decision of Asquith, J., in an action claiming various instalments of rent due under a lease.

The lease was dated 12th May, 1936, and under it Fairway Homes, Ltd., demised to the defendant company for ninety-nine years from 25th March, 1936, ten shop sites coloured red on the annexed plan and fourteen shop sites coloured blue. The defendant company covenanted to build shops on all the sites, eight of them to be erected not later than 25th March, 1937, and the remainder at a subsequent date. The defendant company was also given an option to purchase the freehold of the sites. By a conveyance dated 17th May, 1938, Fairway Homes, Ltd., sold the property and their rights under the lease to the plaintiff company. The affidavit in defence stated that no obligation on the part of the defendant company to erect shops arose until after the outbreak of the present war, and by reason of the outbreak of the war the demand for the shops ceased, finance for their erection became unobtainable, and the restrictions placed by the Government upon buildings and materials therefor made it impossible to erect shops on any of the sites or to continue the development of the sites. The defendants accordingly alleged that the agreement of lease of 12th May, 1936, had been frustrated.

MACKINNON, L.J., delivered the judgment of the court and said that the doctrine of frustration, first clearly enunciated in 1863 in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, had been applied to a variety of contracts, but never to a demise of real property. *London and Northern Estates Co.* v. *Schlesinger* [1916] 1 K.B. 20, *Whitehall Court* v. *Ettlinger* [1920] 1 K.B. 680 and *Matthey* v. *Curling* [1922] 2 A.C. 342 were clear authority that it could not be so applied. All these and many other cases had been reviewed by Birkett, J., in a careful judgment in *Swift* v. *Macbean* [1942] 1 K.B. 375. It was impossible for the defendants to rely upon the doctrine of frustration.

Appeal dismissed.

COUNSEL: *Robert Fortune; H. St. John Field*, K.C., and *Gerald Gardiner*.

SOLICITORS: *Langford, Borrowdale & Thain; Leslie Freeman & Co.*

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

Holdman *v.* Hamlyn.

Scott, MacKinnon and du Parcq, L.JJ. 10th June 1943.

Negligence—Contributory negligence—Claim by infant—Allurement—Defence of common employment—When applicable in claim by infant servant.

Appeal by defendant against a judgment of Croom-Johnson, J., in which he awarded £2,000 damages to an infant plaintiff who alleged that he had been injured owing to the defendant's negligence (1) in inviting and allowing the plaintiff to assist him in a threshing operation when he knew or ought to have known that the threshing machine was dangerous, particularly to a child of the plaintiff's age; (2) in allowing the plaintiff to have anything to do with the operation in progress or to come near the said threshing machine and in not warning him to keep away or taking other reasonable steps to prevent him coming near the threshing machine; and (3) not taking any steps to guard the plaintiff from the danger constituted by the threshing machine.

In the defence, negligence was denied, alternatively contributory negligence and, in the further alternative, the doctrine of common employment was pleaded. The plaintiff was ten years of age and his father was in the employ of the defendant, who was a farmer. On 20th November, 1940, the plaintiff came to the farm for some milk to which his father was entitled under his contract of employment. F, the defendant's son, was threshing corn and he invited the plaintiff to go to the top of a stack on a ladder, and to hand down sheaves of corn, which F put into a threshing machine. After a while, F thought that he had threshed enough corn and the top of the stack was level with the platform containing the hopper for feeding the machine. The machinery was still running and F told the plaintiff to come down from the stack. F, then assuming that the plaintiff had gone down, began sweeping the platform. The plaintiff, however, stepped on to the platform behind F and tried to feed a sheaf into the hopper, but finding it would not go in pushed it in with his foot, and so injured his foot in the revolving machinery that the leg had to be amputated above the knee. No warning had ever been given to the plaintiff about the machine or its danger, nor had he ever been told not to approach it. Croom-Johnson, J., found as a fact that the plaintiff knew nothing of the danger and was not of such an age as to appreciate the danger, even if it was pointed out to him. He further held, with regard to the defence of common employment, that the plaintiff was not of such years of discretion as to be able to understand that by assisting in the operation "he was making any contract or involving himself in any responsibility whatever, and that the doctrine of common employment had no application." His lordship further held that the infant plaintiff was drawn from the place where he was invited to be by the allurement of the temptation to put the one sheaf left lying on the platform inside the opening where F had put the others.

SCOTT, L.J., said that, in his opinion, the judge was fully justified in coming to the conclusion that F ought to have made quite certain that the boy went down when ordered. There was a terrible allurement there to tempt the boy. Nearly all boys were mechanically minded to-day, and the presence of possible danger, not too obvious to frighten, was itself an exciting attraction. The temptation to push the sheaf into the machine was perfectly irresistible, and F would have realised it if he had thought for a moment, especially as he knew the boy's adventurous propensity quite well. His lordship referred to the judgment of Oliver Wendell Holmes, J., in *United Zinc & Chemical Co.* v. *Butt* (1922), 258 U.S. 268, quoted by Scrutton, L.J., in *Liddle* v. *N. Riding of Yorkshire C.C.* [1934] 2 K.B. 101. It was, he continued, impossible to say that the boy was a trespasser; it was equally impossible to state the doctrine of common employment in terms which did not contradict the primary duty of F to take care of the plaintiff. The defence of common employment was fundamentally inapplicable to the case of young volunteers such as the infant plaintiff in the present case.

MACKINNON, L.J., concurred with the judgments of Scott, L.J., and du Parcq, L.J.

DU PARCQ, L.J., said that negligence had been established and it was hopeless to contend that there was contributory negligence. The doctrine of common employment was based on an implied undertaking by the workman and "can never be applicable where there is no relation between the parties from which such an undertaking can be implied" (*Johnson* v. *Lindsay* [1891] A.C. 371, *per* Lord Herschell at p. 378, and *Ratcliffe* v. *Ribble Motor Services* [1939] A.C. 215, *per* Lord Atkin at p. 247; *Degg* v. *Midland Railway Co.*, 26 L.J. Ex. 171; *Potter* v. *Faulkner*, 31 L.J.Q.B. 30; *Hayward* v. *Drury Lane Theatre, Ltd.* [1917] 2 K.B. 899; and *Bass* v. *Hendon U.D.C.* (1912), 28 T.L.R. 317, gave no support to the defendant's case). If the infant plaintiff could properly be called a trespasser at all, the trespass was a natural and probable result of the negligence of the defendant's agent. The true rule was that the doctrine of common employment applied provided that neither (i) the terms of the express contract nor (ii) the facts of the case exclude the possibility of implying such an undertaking. A fictitious undertaking would not be imported unless it could be fitted into the framework of the facts (*Ratcliffe's* case, *supra*); in the present case it could not be reconciled with the facts. His lordship referred to *Cribb* v. *Kynoch, Ltd.* [1907] 2 K.B. 548, and *Young* v. *Hoffman Manufacturing Co., Ltd.* [1907] 2 K.B. 646, and said that it might well be right to say that the position of a child of tender years who to the knowledge of the defendant's servant and agent could not safely be trusted near dangerous machinery was different from that of a young workman, capable of using intelligence and skill. It would be difficult, if not impossible, to maintain that a contract by which a child of ten, working without reward, agreed to bear the risks of a fellow worker's negligence, was beneficial to the child.

Appeal dismissed.

COUNSEL: *E. Kathleen Lane; L. S. Fletcher.*

SOLICITORS: *Routh, Stacey, Hancock & Willis*, for *Knocker & Foskett*, Sevenoaks; *S. Thornhill Tracey* for *F. B. Jevons & Riley*, Tonbridge.

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

CHANCERY DIVISION.

Mendl *v.* Smith.

Simonds, J. 1st July, 1943.

Mortgage—Construction—Interest—Right of Mortgagee.

Adjourned summons.

By a mortgage, dated 21st September, 1937, made between the defendant of the one part and the plaintiffs of the other, after reciting that the plaintiffs had agreed to lend to the defendant £17,194 17s. 6d. upon having repayment thereof secured with interest thereon in manner thereinafter appearing, the defendant covenanted to repay the principal sum on or before the 27th May, 1942. There was no covenant for payment of interest. There was the usual demise of the mortgage premises. The proviso for redemption also contained no reference to interest. In this action the two plaintiffs sought a declaration that interest was payable under the mortgage from the 27th May, 1943, the date fixed for repayment of the principal, until redemption.

SIMONDS, J., said that the mortgagees relied on the statement in Fisher and Lightwood, on "The Law of Mortgages" (7th ed., 737), that: "Contrary to the general rule as to loans, interest is payable upon mortgage debts, even though it is not expressly reserved, and although the mortgage is only equitable, including a charge by mere deposit of title deeds, and generally where the principal sum is a charge on specified property. Where however the contract provides expressly for reconveyance upon payment of the principal, interest will not be payable, unless the deed contains elsewhere an express or implied agreement for payment of interest." The mortgagor objected to that statement on the ground that no such rule existed since the Law Reform (Miscellaneous Provisions) Act, 1934, those statutory provisions having superseded the rule of equity. He (the learned judge) dissented from that proposition. It was now, as it always had been, the rule of the court that, in taking an account upon a mortgage, interest was allowed, even though it was not expressly mentioned, unless there was either some contractual right or equity excluding it. It was suggested that as the contract had expressly provided for redemption on payment of the principal sum, with no mention of interest, that took the case out of the rule. In the present case, as in *Ashwell* v. *Staunton*, 30 B. 52, the recital was of an agreement to secure repayment of the principal with interest, but there was no mention of interest in the covenant to repay or in the proviso for redemption. Those facts did not exclude the obligation of the mortgagor to pay interest. As to the rate of interest, he would follow the authorities where 5 per cent. had been allowed (*Ashwell* v. *Staunton, supra*; *Mellersh* v. *Brown*, 45 Ch. D. 225), and that would be the rate here.

COUNSEL: *Bowyer; Lindsay M. Jopling.*

SOLICITORS; *Eland, Nettleship & Butt; Johnson, Weatherall, Sturt and Hardy.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

In re **Hodge; Midland Bank Executor and Trustee Company, Ltd.** *v.* **Morrison.**

Simonds, J. 2nd July, 1943.

Will—Construction—Life interest in residue—Annuities payable subject to life interest—Life interest disclaimed—Acceleration of annuities.

Adjourned summons.

The testatrix by her will, dated 17th December, 1935, gave two life annuities after the death of her sister and subject to the life interest given to her brother, the first instalment to be paid three months after the death of her brother. She gave her residuary estate to her trustees upon the usual trusts for sale and investment and, after directing payment of the income to her sister for life and then to her brother for life, she directed her trustees after his death to provide for the payment of the annuities. The testatrix survived her sister and died on the 9th July, 1942. Her brother, on the 12th March, 1943, executed a deed disclaiming his life interest under the will. This summons was taken out by the trustees of the will, asking whether the two annuities were payable as from the death of the testatrix.

SIMONDS, J., said that the principle of acceleration was first established with regard to remainders in real estate and probably the origin was to be found in the technicalities of real property law. This principle was extended to interests in personalty and, although no case had been found where acceleration had been applied except to a residuary interest, he saw no reason why, the principle having been extended to personal estate, it should not be applied in the case of any interest whether a partial interest, such as an annuity, or a residuary interest. Accordingly, the annuities had been accelerated. A difficulty arose by reason of the direction that the first payment was to be made three months after the death of the brother. That was really an administrative provision and must be read as meaning three months after the death of the brother or earlier determination of his interest. Accordingly, the annuities ran from the death of the testatrix, the first payment being due three months after her death.

COUNSEL: *G. D. Johnston; Belsham; Stranders; J. A. Reid; H. A. Rose.*

SOLICITORS: *Alfred Neale; Stoneham & Sons; Wrinch & Fisher,* for *Murton, Clarke & Murton-Neale,* Cranbrook.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

KING'S BENCH DIVISION.

E. J. and W. H. Bridgwater *v.* **King (I.T.).**

Macnaghten, J. 12th, 14th July, 1943.

Revenue—Income tax—Loan of £15,000 to traders—Consideration for loan not only interest but a payment by the borrowers of a premium of £4,000—Whether the premium when paid by the borrowers a proper deduction in computing profits—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Cases I and II—Rules applicable, r.* 3 (*f*) (*l*).

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

B and B were public contractors and land estate developers. On 25th June, 1936, they borrowed £15,000 from the M Company at 5 per cent. interest, and it was also agreed that B and B should as well as interest pay an additional sum, which was ultimately fixed at £4,000, as a premium or bonus. B and B actually paid the said sum of £4,000 to the M Company on 29th March, 1938. They contended that the £4,000 was a sum wholly and exclusively expended for the purposes of their trade, and that they were entitled to deduct it in computing their profits for assessment under Case I of Sched. D. The Crown contended that the £4,000 was not properly deductible for it was expressly forbidden by r. 3 (*f*) and (*l*) of the rules applicable to Cases I and II, Sched. D of the Income Tax Act, 1918. Rule 3 provides: "In computing the amount of the profits or gains to be charged no sum shall be deducted in respect of . . . (*f*) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation: . . . (*l*) any annual interest or any annuity or other annual payment payable out of profits or gains . . ." In answer to the Crown's contention, on behalf of B and B, it was contended that the cases of *Gresham Life Assurance Society, Ltd.* v. *Styles* [1892] A.C. 309; 3 Tax Cas. 185; and *Scottish North American Trust, Ltd.* v. *Farmer* [1912] A.C. 118, 5 Tax Cas. 693, supported the proposition that the £4,000 was not employed as capital, but was paid to the M Company for the use of money which B and B borrowed, and therefore did not come within the scope of r. 3 (*f*). Furthermore, they contended that sub-r. (*l*) did not apply, because the payment of the £4,000 was not an annual payment. The Special Commissioners held that the sum of £4,000 was not deductible owing to the provisions of r. 3 (*f*) of the rules.

MACNAGHTEN, J., said that in the case of *The European Investment Trust Company, Ltd.* v. *Jackson,* 18 Tax Cas. 1, it was decided that whether a case came within the provisions of r. 3 (*f*) was a question of fact, and therefore he could not interfere with the finding of the Special Commissioners. The appeal would therefore be dismissed.

COUNSEL: *Cyril King,* K.C., and *Mustoe; The Solicitor-General* (Sir David Maxwell-Fyfe), K.C.

SOLICITORS: *Piper, Smith & Piper; Solicitor of Inland Revenue.*

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

The publishers of THE SOLICITORS' JOURNAL undertake the binding of issues in the official binding covers. The 52 issues for 1942 are bound in one volume, in either green or brown cloth (15s.). Prices for binding earlier volumes will be sent on request. Issues, together with the appropriate Index, should be sent to THE SOLICITORS' JOURNAL, 29/31, Breams Buildings, London, E.C.4.

Societies.

GLOUCESTERSHIRE AND WILTSHIRE INCORPORATED LAW SOCIETY.

The annual meeting of this Society was held on the 17th July under the chairmanship of the President, Sir Gilbert McIlquham, of Cheltenham. The annual report and accounts were received and adopted. Mr. C. O. Gough, of Calne, was elected President, and Mr. R. Russell Smith, of Stroud, Vice-President, for the ensuing year. The General Committee, Library Committee, and Poor Persons Cases Committee were appointed. Charitable grants, amounting to £21, and a donation of £26 5s. to the funds of the Solicitors' Benevolent Association were voted. The membership of the society is now 158.

Parliamentary News.

HOUSE OF LORDS.

Isle of Man (Customs) Bill [H.C.].
Pensions Appeal Tribunals Bill [H.C.].
Read Second Time. [27th July.

HOUSE OF COMMONS.

Coal Bill [H.C.].
Read Third Time. [28th July.
Law Reform (Frustrated Contracts) Bill [H.L.].
Read Second Time. [23rd July.
Town and Country Planning (Interim Development) (Scotland) Bill [H.C.].
Read Second Time. [21st July.

War Legislation.

STATUTORY RULES AND ORDERS, 1943.

No. 990. **Contributory Pensions** (Exempt and Excepted Persons) Amendment Regulations, July 7.
E.P. 867. **Finance.** Regulation of Payments (French North and West Africa) Order, July 15.
E.P. 985. **Food** (Restriction on Dealings) Order, July 15, prescribing an appointed day for the purposes of the Food (Restriction on Dealings) Order, 1941.
No. 822. **Trading with the Enemy** (Authorisation) Order, July 15.
No. 821. Trading with the Enemy (Specified Areas) Revocation (No. 2) Order, July 15.

WAR OFFICE.

Regulations for Home Guard, 1942:—
Vol. I. Amendment 5, June, 1943.
Vol. II. Amendment I, June, 1943.

Notes and News.

Honours and Appointments.

The Lord Chancellor has made the following arrangements, owing to the retirement of His Honour Judge Sir Mordaunt Snagge, to take effect on 25th July:—

His Honour Judge AUSTIN JONES, M.C., to be the Judge of Westminster County Court in the place of Sir Mordaunt Snagge; His Honour Judge DAVIES, K.C., to sit as Additional Judge at that court, and His Honour Judge TUDOR REES to be the Judge of Uxbridge County Court.

Notes.

With reference to the "Landlord and Tenant Notebook," entitled "'Fictitious' Standard Rent," which appeared in our issue of the 26th June last, at p. 227, we understand the rent restrictions case discussed therein is to be the subject of an appeal. The appellants are the Conqueror Property Trust, Ltd., and the respondents are the Barnes Borough Council.

The Company Law Amendment Committee, appointed by the President of the Board of Trade, to consider, under the chairmanship of Cohen, J., the amendment of the company law, has held two meetings. The committee has decided to invite various organisations and individuals to submit written statements of their views on the subjects which fall within the scope of the committee's inquiry. The organisations and individuals will be invited both to submit general recommendations and also to make suggestions under the following main headings—restrictions on use of names, shares of no par value, prospectuses and offers for sale, private companies, debentures, shares and debentures held by nominees, financial relations between companies (including subsidiary companies) and directors and former directors, balance sheets and profit and loss accounts, appointment and functions of auditors, relations of holding and subsidiary companies, shareholders' control, protection of classes and minorities, liability of companies for acts of their officials, reconstruction and amalgamation, investigation of affairs of companies and winding-up. When the committee has studied the written statements submitted, they will proceed to hear oral evidence. The committee will be prepared to receive the suggestions of any organisation or individual, apart from those invited, whether they have general suggestions to make or particular suggestions under any one, or all, of the headings set out above. Communications should be addressed to the Secretary of the committee at Romney House, Tufton Street, S.W.1.